NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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EX PARTE

Mr. William Caton, Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Mr. Caton:

On April 5, 2002, Daniel Brenner, Senior Vice President, Law and Regulatory Policy, Jill Luckett, Vice President, Program Network Policy, Michael Schooler, Deputy General Counsel, and Diane Burstein, Deputy General Counsel, met with Jane Mago, Joel Kaufman and Susan Aaron of the FCC's General Counsel's Office.

Consistent with NCTA's Opposition to the Petitions for Reconsideration in the above-captioned proceeding, we argued that the FCC correctly interpreted the "primary video" provision of the 1992 Cable Act to mean carriage of a single digital program stream. The FCC's interpretation gave the most reasonable meaning to the term "primary." Alternative interpretations advanced by the Petitions for Reconsideration would render the term superfluous, in violation of basic canons of statutory construction.

In particular, we pointed out the broadcasters' reference to "primary" as in "primary colors" is inept, because there remains "secondary" colors in the ordinary use of that expression. Here, if a multicasting broadcaster were to use all of its digital spectrum for non-subscription video, there would be no "secondary" video to speak of; the FCC's interpretation of "primary" to mean a single program stream avoids this illogical reading of the language.

NCTA further discussed how even if the statute were somehow viewed as ambiguous, the Commission's interpretation would still be compelled by constitutional considerations. A contrary interpretation would raise serious concerns under both the First and Fifth Amendment, and hence should be avoided by the Commission under long-standing principles of construction. Finally, NCTA argued that any allegation that carriage of multicast signals might be necessary to ensure the survival of broadcasting was mere conjecture and not based on any record evidence. Such speculation could not justify the burden that adoption of a multicast carriage rule would impose on the constitutional rights of cable operators and programmers.

Respectfully submitted,

Daniel L. Brenner

cc: Jane Mago, FCC General Counsel
Joel Kaufman
Susan Aaron